

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIAIn re WELLS FARGO RESIDENTIAL
MORTGAGE LENDING
DISCRIMINATION LITIGATION

No. C 08-1930 MMC (JL)

ORDER

This Document Relates To:

ALL ACTIONS

Introduction

All discovery in this case has been referred to this Court by the district court (Hon. Maxine M. Chesney) pursuant to 28 U.S.C. §636(b). The Court heard oral argument on the issue of Defendant's claim of privilege for its loan methodologies and permitted additional briefing at the parties' request. Andrew Friedman, Bonnett Fairbourn Friedman & Balint, P.C., Phoenix, Arizona; Gary Klein, and Willow Radcliffe appeared for Plaintiffs. Tyree Jones and David Reidy appeared for Defendants. The matter was submitted. The Court hereby grants in part Plaintiffs' motion to compel production of documents related to Wells Fargo's loan methodologies, as discussed in more detail below. Wells Fargo shall produce to the Court for in camera review 268 pages of documents responsive to Plaintiffs' narrowed request for which it claims attorney-client or work product privilege. In addition, Wells shall provide a declaration under penalty of perjury that these pages constitute a representative sample of the 268,000 pages of documents for which Wells claims privilege.

1 In addition, Wells shall produce to Plaintiffs all documents for which it relies solely on the
2 bank examiner privilege, with the exception of documents created by the Office of the
3 Comptroller of the Currency ("OCC"). Wells shall produce to Plaintiffs and e-file with the
4 Court a Final Supplemental Privilege Log. Any claim of privilege shall be waived for any
5 document not listed on this or previous logs. Compliance with this Order is due within two
6 weeks of its issuance.

7 **Discovery in Dispute**

8 Plaintiffs requested an order for production of all documents responsive to their
9 Requests for Production of Documents Numbers 23 and 39, that relate to the
10 methodologies developed and used during the class period by Wells Fargo in conducting
11 its internal fair lending analysis on loans (both prime and nonprime), made through its retail
12 (loan officer), wholesale (brokers) and correspondent lender channels. The Court at the
13 hearing on this motion granted most of Plaintiffs' requests but Defendants requested an
14 opportunity to brief its claims of privilege for loan methodology documents, which the Court
15 granted. (See Minute Order at Docket # 64) These include documents that deal with the
16 design and implementation of all statistical regression modeling studies Wells Fargo
17 performed on prime and nonprime loans made through its three lending channels. These
18 are documents relating to the methodologies which were employed by Wells Fargo's
19 Modeling Team: procedure manuals, the modeling documentation and modeling notes
20 discussed by Ms. Tamara Denton in her deposition, all communications between the
21 Modeling Team and Ms. Denton as well as any other Wells Fargo representative who was
22 not an attorney in Wells Fargo's Law Department, or any non-Wells Fargo person or entity
23 other than outside legal counsel.

24 Plaintiffs did not brief the issue of any privilege attached to the results of fair lending
25 analyses, or of any summaries or interpretations of such results or of any communications
26 directly to or from attorneys in the Law Department discussing the results of fair lending
27 analyses. Plaintiffs express their belief that such documents either are not privileged, or
28 that any privilege has been waived by Wells Fargo by its failure to list these documents in

1 its Privilege Log. Plaintiffs argue that Wells Fargo has waived any privilege for these
2 documents, in two ways, by failing to list them on its Privilege Log and by citing them in
3 support of an affirmative defense, that it implements fair practices in its mortgage lending.

4 Plaintiffs further refined their discovery request in their Response to Defendants's
5 supplemental brief on privilege: "Plaintiffs seek *only* those documents that relate to the
6 work of the Modeling Team. These documents include the raw statistical data produced by
7 periodic regression modeling runs performed during the class period, the modeling
8 documentation and modeling notes that describe the modeling runs and the methodologies
9 used in them, and communications between members of the Modeling Team and other
10 non-lawyer persons (Wells Fargo personnel or outside third parties) about the modeling
11 runs." Plaintiffs' Reply at 1:3-8. (Emphasis in original) Plaintiffs argue that "*None* of this
12 information constitutes privileged attorney-client communications. The statistical regression
13 data and modeling notes is factual information to which the attorney-client privilege does
14 not apply. The communications are between non-lawyers and therefore also non-
15 privileged." *Id.* at 1:9-12.

16 Wells Fargo estimates that there are 268,000 documents responsive to Plaintiffs'
17 request for which it claims privilege. Wells claims it is unable to reduce its estimate even in
18 response to Plaintiffs' narrowed request. (Letters to this Court from Wells counsel Tyree
19 Jones e-filed at Docket Numbers 117 and 127). The Court is skeptical of this contention,
20 and Wells' second letter did not really respond to the Court's question regarding how the
21 Plaintiffs' narrowed request might reduce the number of responsive documents, but merely
22 repeated Wells' previous arguments that the documents are privileged. However, the Court
23 does not have the documents before it, nor does it have the time or the resources to review
24 268,000 pages.

25 **Plaintiffs Allege Defendant has Waived Privilege by Failure to List Documents**
26 **on Privilege Log**

27 Wells Fargo argues in response that it did indeed list loan methodology documents
28 in its Privilege Log; Plaintiffs merely failed to cite the pertinent portions to the Court. Wells

1 also asserts its right to supplement or augment its Privilege Log without waiver. (Def. Opp.
2 At 5-6), citing *Burlington Northern & Santa Fe Ry. Co. V. U.S.D.C. Montana*, 408 F.3d
3 1142, 1147 (9th Cir. 2005). Wells Fargo argues that its Privilege Log clearly identifies
4 documents reflecting the statistical modeling notes and fair lending analysis now sought by
5 Plaintiffs. Wells claims these documents are indisputably the subject of communications
6 with the Law Department and are therefore privileged.

7 Wells Fargo also notes that the methodologies at issue are included in reports to
8 legal counsel, as reflected in the Privilege Log. Further, the statistical models and formulas
9 are developed by the Fair Lending Testing and Analytics Team ("FLT & AT"), a full-time fair
10 lending manager and a group of statistical modelers and fair lending analysts, who work at
11 the direction of, and in conjunction with, Law Department attorneys dedicated to fair
12 lending. The statistical methodologies developed by the FLT & AT analyze Wells Fargo's
13 loan level data to gather results that inform legal counsel's advice regarding fair lending
14 issues. As discussed below, Wells must produce a Final Supplemental privilege Log or
15 waive claim of privilege for all unlisted documents.

16 **Waiver by Citing in Support of Affirmative Defense**

17 Plaintiffs also argue that Wells Fargo has waived any privilege for these documents
18 by citing them in support of an affirmative defense that it implements fair practices in its
19 mortgage lending. In *Fox v. California Sierra Financial Services*, a court in this district held:
20 "By asserting affirmative defenses, defendants have placed the information supporting
21 those affirmative defenses at issue in this lawsuit. The general rule is that placing privileged
22 communications at issue in a lawsuit waives the privilege for such communications."

23 To waive the attorney-client privilege by voluntarily injecting an issue in the case, a
24 defendant must do more than merely deny a plaintiff's allegations. The holder must
25 inject a new factual or legal issue into the case. Most often, this occurs through the
26 use of an *affirmative defense*. (emphasis added).

27 *Fox*, 120 F.R.D. 520, 530 (N.D.Cal.,1988), citing *Lorenz v. Valley Forge Ins. Co.*, 815 F.2d
28 1095, 1099 (7th Cir.1987).

1 Courts in the Ninth Circuit have adopted the following test to determine whether an
2 implied waiver of the attorney-client privilege has occurred:

3 [A]n implied waiver of the attorney-client privilege occurs when (1) the party
4 asserts the privilege as the result of some affirmative act, such as filing suit; (2)
5 through this affirmative act, the asserting party puts the privileged information at
6 issue; and (3) allowing the privilege would deny the opposing party access to
7 information vital to its defense.

8 *Home Indemnity Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1326 (9th Cir. 1995); see
9 also *Genentech, Inc. v. Insmmed Inc.*, 236 F.R.D. 466, 468 (N.D.Cal. 2006). In this case,
10 however, Plaintiffs cannot prove any of these three requirements, and therefore Wells
11 Fargo has not waived its attorney-client privilege and the methodological materials covered
12 by the attorney-client privilege are protected from discovery. First, Wells Fargo has not
13 asserted the privilege as a result of some affirmative act or put the privileged information at
14 issue. It is true, certainly, that Wells Fargo's Law Department has developed means to
15 monitor and ensure compliance with fair lending laws and regulatory requirements, and
16 Wells Fargo concedes that it asserts on its website, in advertisements, and in this litigation
17 that it is a fair housing lender. However, it argues that the advice of Wells Fargo's Law
18 Department regarding its fair lending methodologies is not at issue in this case. "Advice is
19 not in issue merely because it is relevant, and does not necessarily become in issue merely
20 because the attorney's advice might affect the client's state of mind in a relevant manner."
21 *Genentech*, 236 F.R.D. at 469. While Plaintiffs assert that the Law Department's internal
22 legal advice, and the methodological materials upon which that advice rests, will be
23 relevant because anything that involves fair lending will be relevant, Wells argues that this
24 argument was specifically rejected by this District in *Genentech*.

25 Wells contends that it will not rely on the advice of its in-house counsel or the
26 employees in the legal department as a defense to Plaintiffs' suit; these documents are
27 therefore not "at issue" in this case. Wells argues that for this Court to hold otherwise would
28 have a fatally chilling effect on its law department's ability to receive candid communication
from non-lawyer company employees needed to develop their legal conclusions to properly
advise the company.

1 Wells' argument that it has not cited attorney advice as part of an affirmative
2 defense is well-taken and the Court finds insufficient indicia for waiver of privilege via
3 assertion of an affirmative defense. The mere fact that Wells asserts its virtue as a fair
4 housing lender does not make its attorneys' advice fair game for Plaintiffs' inquiry.

5 **Bank Examiner's Privilege**

6 Wells claims an additional basis of privilege for some of these documents, the bank
7 examiner's privilege. Wells relies on Section 607(a) of the Financial Services Regulatory
8 Relief Act of 2006. Congress mandated that submission of privileged information to a
9 government regulator in the course of a supervisory or regulatory process does not waive
10 the privilege as to any other person or entity. Wells claims that, as a federally chartered
11 bank regulated by the Office of the Controller of the Currency ("OCC"), it has provided
12 statistics methodologies and the results of those methodologies to the OCC pursuant to a
13 fair lending examination by the OCC in 2007. These communications, argues Wells, are
14 therefore protected from disclosure by the bank examiner's privilege, and were so properly
15 identified on Wells' Privilege Log. Furthermore, according to Wells, Plaintiffs failed to follow
16 the statutorily prescribed procedure for obtaining non-public information for a bank
17 regarding regulatory activities - that is, they did not notify the OCC of the request and allow
18 the agency an opportunity to be heard. *Overby v. US. Fidelity & Guar. Co.*, 224 F.2d 158
19 (5th Cir. 1955); *In re NextCard, Inc. Securities Litigation*, 2003 WL 23142199 (N.D.Cal.
20 2003). The court in that case found, "We do not think that any privilege has been waived
21 by putting copies of the documents in the hands of the directors of the bank. Only in that
22 way could the documents be effectively used for their whole purpose which was the
23 adequate supervision and regulation of national banks. If the bank directors violated their
24 trust and, without authority, showed copies of the examiner's reports to the bank's attorneys
25 and auditors for the purposes of this litigation, it nevertheless remains true that, 'The
26 privilege belongs to the Government and must be asserted by it; it can neither be claimed
27 nor waived by a private party.' Hence, any wrongful disclosure of these reports by the bank
28

1 directors cannot constitute a waiver of the Government's privilege. “ *Overby*, 224 F.2d at
2 163 (internal citation omitted).

3 On reading *Overby*, the Court notes that the documents at issue in that case were
4 bank examiners' reports, *created by the OCC and produced to the bank*, not the other way
5 around, as in this case. In the *Overby* case the OCC, as the creator of the reports, was the
6 holder of the privilege and entitled to assert it. This is not the situation here. Wells Fargo
7 created these documents, not the OCC. The mere fact that Wells created the documents
8 as part of its compliance with a regulatory scheme does not make them OCC documents.
9 They were not created *by* the OCC, even if they may have been created *for* the OCC. (Def.
10 Supp. Brief at p. 9) Accordingly they are not privileged under the bank examiner privilege.
11 Any documents not created by the OCC for which the bank examiner privilege is the sole
12 privilege claimed shall be produced to Plaintiffs.

13 **Failure to Meet and Confer**

14 Finally Wells Fargo claims that Plaintiffs failed to meet and confer regarding these
15 documents and do not need the documents to conduct the statistical analysis to support
16 their allegations. Wells contends that after it produces the loan level data, Plaintiffs' experts
17 are free to analyze the data using their own statistical models, and therefore Plaintiffs fail to
18 show a need to force Wells Fargo to reveal its internal privileged analysis or
19 methodologies. The Court would ordinarily require that parties meet and confer to attempt
20 to resolve their dispute but in this instance it would be futile to order these parties to meet
21 and confer formally on this issue, since they have already argued before the Court and
22 submitted supplemental briefing. This would merely create additional delay, when this issue
23 initially came before the Court three months ago.

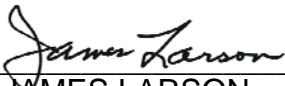
24 **Order**

25 The Court read and considered the pleadings and supplemental briefing and the
26 arguments of counsel and the record in this case, and finds that reviewing a sample of the
27 documents *in camera* is necessary for the Court to answer the threshold questions whether
28 they are attorney-client communications, and whether they contain either nonprivileged
facts or legal advice. Accordingly, it is hereby ordered that 268 pages, as a representative

sample of the documents at issue, be produced for *in camera* review. The documents at issue are specifically those documents that relate to the work of the Modeling Team. These documents include the raw statistical data produced by periodic regression modeling runs performed during the class period, the modeling documentation and modeling notes that describe the modeling runs and the methodologies used in them, and communications between members of the Modeling Team and other non-lawyer persons (Wells Fargo personnel or outside third parties) about the modeling runs. Wells Fargo shall produce to the Court for in camera review 268 pages of documents responsive to Plaintiffs' narrowed request for which it claims attorney-client or work product privilege. Wells shall provide a declaration under penalty of perjury that these pages constitute a representative sample of the 268,000 pages of documents for which Wells claims privilege. In addition, Wells shall produce to Plaintiffs all documents for which it relies solely on the bank examiner privilege, with the exception of any documents which were created by the Office of the Comptroller of the Currency ("OCC"). If Wells Fargo claims privilege for any responsive documents which are not on its Privilege Log, it shall produce to the Court and Plaintiffs a Final Supplemental Privilege Log. Privilege shall be waived for any documents not listed on this or prior logs. Compliance shall be due within two weeks of issuance of this order.

IT IS SO ORDERED.

DATED: June 4, 2009



JAMES LARSON
Chief Magistrate Judge

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